UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CADILLAC OF NAPERVILLE

and

Cases 13-CA-207245

AUTOMOBILE MECHANICS LOCAL 701,
INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS
AFL-CIO

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted:

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TABLE OF CONTENTS

Page

I. BACKGROUND

This case arises from a lengthy strike that was undertaken by the union in the late summer/early fall of 2017. The facts amply demonstrate the kind of regrettable behavior that strikes cause and serve as a cautionary tale for the types of irreparable emotional injuries that arise from the hard feelings that ruminate long after a strike ends. While the Employer's behavior was far from perfect, it is emotionally reactionary to find merit to many of the unfair labor practices which were alleged to have occurred. While management's behavior may not have been exemplary to a Sunday School class, it is hardly shocking in the very adult world of labor disputes and work stoppages. A careful examination of the facts, devoid of emotional attachment, demonstrates that Respondent is not guilty of many of the unfair labor practice findings that are the subject matter of these Exceptions.

Respondent is an auto dealership located in Naperville, IL, which is individually owned and operated by Frank Laskaris. (Tr. 203-204).[1] At the time of the alleged unfair labor practices, Cadillac of Naperville was the only store owned by Laskaris. Mr. Laskaris owned this dealership since he acquired it in 1996. (Tr. 204) At the time of acquisition, Respondent's mechanics were represented by the union, the Charging Party in this matter. Several years after Laskaris purchased this Cadillac dealership, it became a member of the Chicago area New Car Dealer Committee (herein "NCDC"), which is a multi-employer bargaining group that was established for the purpose of bargaining with the union. (Tr. 203) Previously, the parties had engaged in "convenience bargaining" whereby one collective bargaining agreement was negotiated and over a hundred dealers acquiesced, but the NCDC obviated the need for that for

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[1] Pages of the transcript are designated herein by "Tr.__", the General Counsel's exhibits by "GC" and a number, Joint exhibits by "Jt" and a number, Respondent's by "R" and a number, and references to Judge Rosas's decision as "ALJD p.__).

formalizing the multi-employer bargaining model. The NCDC is comprised of 129 unionized dealers and covers approximately 1,949 bargaining unit employees. (Tr. 24)

A. Strike

The union commenced a strike that lasted from August 1, 2017 until September 17, 2017. The strike was marred with incidents that resulted in the police being called numerous times and employees being caught on video blocking customer egress from the facility. (ALJD p. 5, 12) Ultimately, the NCDC negotiated a strike settlement agreement that required strikers be returned to their previous positions. (ALJD pp.6-7)

B. Return to Work

The union's entire effort at returning to work was nothing more than a provocative scam. It was a clear design to stir up more ill will between the parties and with any luck from the union's perspective, it would create some unfair labor practices. The greatest and most obvious evidence of this scheme is that for the first two days, the employees "returned to work" without their tools. For instance, union leader Cicinelli informed Laskaris that the employees did not have their tools at noon, but they had the remainder of the day to pick them up. (ALJD p.9) Simply, there was never any honest intent to return to work in the early days of the union's offer to "return to work."

The very first day after the strike settlement had been ratified, the union gathered all of the striking employees, Sam Cicinelli, the managing business representative, and the union business agent (Ken Thomas) and amassed outside Respondent's dealership. (Tr. 168, 284) Around 7 a.m. on the 18th, Cicinelli, Thomas and Bisbikis entered the dealership and approached the office of the owner, Frank Laskaris. (Tr. 38-39, 221, 284-285) At the time, Laskaris was meeting with John Francek. During this initial conversation, Bisbikis was excluded at Laskaris's

insistence and Laskaris attempted to see if employees would accept a cash buy-out not to return to the dealership. (Tr. 41, 169, 221-2, 284-287)

Thereafter, during a second meeting in Laskaris's office, Bisbikis engaged in conduct resulting in his termination. Critically, ALJ Rosas credited Laskaris's testimony that Bisbikis called his boss a "stupid jack off" in Greek. This finding was explicit. (ALJD p.8, fn. 17) This is significant, because the ALJ's Decision finds that Laskaris told Bisbikis to "get the fuck out before I get you the fuck out," without making any particular credibility finding. Of the four witnesses testifying to the conversation in Laskaris's office, only one (Cicinelli) testified to this statement. (Tr. 45, 128-130, 168-172, 231-234) This is a curious, unsupported finding in light of the fact that Cicinelli was discredited throughout the Judge's Decision.

II. ARGUMENT

A. Procedural Defects

There were two procedural errors during the hearing, one of which constitutes a blatant, flagrant and intentional disregard of well-established law and procedure by Judge Rosas and the second which followed current Board law, but which requires additional scrutiny from the Board and should be modified in this and all future proceedings.

1. Witness Statements[2]

Throughout the hearing, Respondent's counsel properly requested that he be furnished with *Jencks* material, which was comprised of sworn witness statements.[3] These requests for witness statements were made for legitimate cross-examination purposes, and no argument to the contrary was ever proferred. ALJ Rosas required that every single witness statement be returned

[2] Exception 1.
[3] *Jencks*, 19 U.S.C. 3500 (1957)

to Counsel for the General Counsel at the conclusion of the witness's testimony. This is unfair, improper and unsupportable.

In his Decision, the Judge wrote, "[a]s I ruled at the time, that the Board's holding in that decision, as well as Section 102.118 of the Board's Rules and Regulations, is not inconsistent with my practice of permitting renewed access to witness affidavits upon request in connection with the cross-examination of other witnesses." (ALJD p.2, fn. 3) This statement misses the point entirely. First, the decision to which he refers, *Wal-Mart Stores, Inc.*, 339 NLRB 64 (2003), explicitly governs this situation. In *Wal-Mart*, the Board expressly ruled that an ALJ does not have discretion to allow retention of statements *after the close of the hearing. Wan-Mart* explicitly ruled that as an "operating procedure" counsel may retain the copy throughout the hearing to use for any legitimate trial purpose, but upon the close of the hearing, the copy provided must be returned. See also, *1970 Committee Reports*, Sec. of Labor Relations Law, American Bar Association, Vol. II, p.12. While the reasons for this rule should be obvious, they bear articulating. NLRB proceedings do not have discovery. For the most part, the evidence is in possession of the party who intends to proffer it. However, this "trial by surprise or ambush" slants in the favor of the Counsel for the General Counsel, because they have investigated the matter. They have the witness statements in their possession from the incipient stages of the investigation. Then, they acquire the Respondent's evidence in whatever form Respondent chooses to offer. In addition, the investigators possess the power of the investigative subpoena, a strategy that is not reciprocated upon a responding party. Thus, the entirety of the critical evidence is in possession of the Counsel for the General Counsel the entire time prior to trial, a period which can encompass a year, or more.

In a case such as this, the judge is parsing credibility determinations on razor thin margins and these determinations are outcome determinative. Respondent's counsel is afforded ten to fifteen minutes to review witness statements that average between ten and twenty pages. Then, counsel is required to proceed with the cross-examination and immediately relinquish the witness statement. This arrangement positively denies counsel a reasonable opportunity to absorb the nuance of the statement and focus on the picayune details which often play a critical role in the outcome of the trial.

Judge Rosas states that there is "nothing inconsistent" in the cases and Rules with ***his*** practice of requiring the affidavits returned immediately upon conclusion of the examination. This statement is wrong on the law, undermines the spirit of the rule, unfairly prejudices Respondents and misdirects the actual issue before the court. Judge Rosas states that there is nothing inconsistent between the actual rules and a practice permitting renewed access to witness statements. Plainly, there is no issue before this tribunal about renewed access to witness statements. This obvious misdirection is designed to distract from the central issue - the requirement that Respondent be permitted to review witness statements until the conclusion of the proceeding. The *Wal-Mart* holding is unequivocal, counsel may keep the statement until the close of the hearing. During the hearing, Judge Rosas defended his disregard of the case law arguing that he has "discretion" granted to him by the Board's Rules and Regulations. He specifically cited NLRB Rule and Regulation 102.118(b)(1) which specifically permits the release of witness statements for the purpose of cross-examination. The Rule is silent regarding the duration which a party is entitled to review a witness statement. Critically, the Rule does **NOT** grant a judge discretion either explicitly or implicitly. The word discretion does not appear

in 102.118(b). Therefore, discretion to deny counsel an adequate amount of time to review a statement cannot be inferred.

Judge Rosas inexplicably disregards the holding of *Wal-Mart* in favor of his own favored courtroom practice. Alarmingly, the battlefield of American jurisprudence is becoming littered with rulings from judges who deviate from established law and procedures in favor of their own folly or frolic. Adherence to the existing law is remarkably easy, there exists a bright line rule that a Respondent is entitled to review a witness statement until the conclusion of the hearing. There is no reason to deviate from this ruling, it is not controversial. Adherence to this does not endanger witness veracity and in no way undermines Counsel for the General Counsel. However, permitting judicial discretion where none actually exists and none is intended could have a devastating impact. Artful courtroom lawyers will be faced with no choice but to cross-examine witnesses carefully regarding their statements and then offer them into the trial record so that the details can be examined more carefully and argued in the brief regarding witness credibility. Trial records should not be burdened with witness statements as exhibits and most witness statements do not need to become part of the public record.

Judge Rosas failed to follow a clear red letter rule in operating this hearing procedurally. In light of the extraordinary significance afforded witness credibility in this case, a remand is appropriate for cross-examination surrounding those areas which are credited, but uncorroborated; credited without proper evaluation of the witnesses true recollection; or to fully examine the facts of this case as established by the investigative record.

2. Illegally Obtained Evidence[4]

Judge Rosas permitted introduction of a surreptitious tape recording of a private conversation. (ALJD p.15, fn. 35) In this instance, Judge Rosas correctly states that Board law

[4] Exception 4.

permits the introduction of such evidence, even where state law makes such recording unlawful. See, *Times Herald Record*, 334 NLRB 350, 354 (2001), enfd. 27 Fed. Apps. 64 (2d Cir. 2001). This case presents an opportunity for the Board to re-examine this misguided ruling.

B. Bisbikis

John Bisbikis was a malcontent employee who was particularly embittered by the strike. He was a loyal union solider, who became overcome with venom at the thought of replacements, at the thought of an employer who refused to kowtow to his every whim and desire and who believed that engaging in a strike made him invincible. Make no mistake, the union absolutely overwhelmed the NCDC in this strike. The NCDC negotiated like a junior high debate team and made tactical decisions that will undermine its constituency for decades. Nonetheless, union membership's taste of victory is not universal and the rank-and-file still has an obligation to maintain professional decorum.

The critical finding supporting the Judge's conclusion that Bisbikis was terminated unlawfully hinges around the June 29 conversation wherein the Judge found that Laskaris told Bisbiks in the event of a strike, things would not be the same.[5] (ALJD p.21)[6]

The Judge explained his rationale by stating, "[o]n June 29, with negotiations dragging on..." Nowhere in the testimony, of any of the witnesses was the state of the negotiations characterized as "dragging on." The record is utterly devoid of any evidence regarding how many negotiating sessions took place between May 6 and June 29, nor what, if anything, occurred during the negotiating sessions. This characterization is made from whole cloth and represents a precarious presumption. If one starts from the faulty presumption that negotiations were "dragging on" a host of faulty conclusions can be raised from that inherently biases

[5] Exception 3
[6] Exceptions 2 and 5.

foundation. Moreover, the Judge stated, almost as an afterthought, that he credited Bisbikis's detailed version of the June 29 conversation.

The **entirety** of the detailed testimony is as follows:

> Q: What was said and by whom during that conversation?
>
> A: I initiated the meeting to discuss some issues I was having in the shop, and after we talked about those issues, he started the conversation by saying that if we went on strike, things wouldn't be the same.
>
> Q: Did he explain to you during that conversation when he meant by the phrase things wouldn't be the same.
>
> A: No.

That is it. That is the entirety of the "detailed" version of the conversation. After a year contemplating this litigation, after countless reviews of his affidavit and preparation sessions, Bisbikis's detailed recollection entails a single sentence. The Judge found that Laskaris denied thinking about a strike. Now, Laskaris actually recalled this same conversation in far greater detail. It bears noting that Laskaris had no clue what Bisbikis would testify to, nor did he have any statement to review. Nonetheless he testified as follows:

> Q: So – now, prior to the time of the strike did you have a conversation with John Bisbikus in your office before the strike? I think the topic may have been T-shirts?
>
> A: I had a conversation about T-shirts.
>
> Q: Tell us the story behind that conversation.
>
> A: The story behind that conversation was that it came to my attention that we allowed the mechanics to design their own T-shirt, pick the material and pick out the desirable T-shirt they want. Our policy at the dealership has always been with outfits and uniforms like this as we negotiate our best wholesale deal. We offer the employees these items at wholesale cost. They get two for one. So essentially they're paying 50 percent of wholesale cost for one item, which is extremely reasonable.

So essentially we pay for half and they pay for half of what they get, and that goes throughout the dealership. And the union technicians got to design their own T-shirt for what they're comfortable wearing in the summer when it's hot; and it came to my attention late on that they designed this shirt, we ordered the T-shirt, we put it in stock, and I think the net cost to them was about $2 per shirt, and they were all squawking that they didn't want to pay.

And it became big scuttlebutt about we are not paying because they used to be free, I've been here for a long time and they were free. So we had a conversation about that.

Q: How did the conversation start? Did he come to you or did you go to him?

A: I think he came to me.

Q: And this was in your office?

A: I don't remember but perhaps.

Q: What did he say?

A: He said he didn't think it was right that they had to pay for T-shirts; and I said to him that I thought that their position was foolish.

He said, "I must have 50 of these at home, and I never paid for them over 15 years."

So I'm sure you shouldn't have 50, but if you have 50 and we ask you to buy ten shirts for 20 bucks, wouldn't it be a good example to set for the rest of the young guys back there that, you know what, we all got to pitch in for the cause, and if we want these T-shirts and we are going to wear them, it's $20. I said, "If you took the $20 you're going to spend on these ten T-shirts right now and added it to the 50 you had at home and divide it out, 60 T-shirts by the 50 – or the 20 bucks you're about to spend, aren't we talking about pennies per shirt? Isn't this ridiculous, John?"

And he said, "Well, it was free once, it needs to be free now." And I disagreed with him.

ADMINISTRATIVE LAW JUDGE: What's the time frame?

THE WITNESS: I think months before the strike.

BY MR. MACHARG:

Q: Okay. Did you discuss a potential strike at that time with Mr. Bisbikus?

A: No.

Q: Did you tell him that if they went on strike things will never be the same?

A: I didn't talk about the strike. I wasn't thinking about a strike.

It is evident that Laskaris had some fairly clear recollection of his inter-action with Bisbikis. Therefore, considering the initial incorrect supposition that negotiations had been "dragging on," it is easy to see how one could reach the erroneous conclusion that Bisbiks testified in detail, while Laskaris managed only a "steadfast denial."

It is axiomatic that credibility resolutions will not be disturbed unless a clear preponderance of all relevant evidence convinces the Board that the resolution was incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951) However, where a judge relies upon inappropriate bases to assess credibility and intertwines those bases with other legitimate considerations to such an extent that the Board is precluded from determining whether the judge's credibility finding may be adopted based upon the legitimate considerations. *International Longshoremen's Association, Local 28 (Ceres Gulf, Inc.)*, 366 NLRB No. 20 (2018) Such is the factual situation here. First, it is noteworthy that neither of the other union witnesses to this conversation corroborates Bisbikis. The judge has apparently relied upon the wholly unsupported idea that negotiations were "dragging on." The judge credited as "detailed" a statement that was abbreviated, devoid of detail and conclusory. Coupled with the judge's incorrect ruling on reviewing the witness statement, this may present precisely the case as in *Ceres Gulf*, that is, a remand may be appropriate in order to further test Bisbikis on the depths of the June 29 conversation. This situation is also perfectly appropriate to

simply reject the judge's credibility resolution that there was a strike discussion and dismiss this allegation.[7]

Finally, even if the conversation stands as credited, it simply is not a threat. The judge relied upon the timing, stating that it occurred "just before a strike was about to begin." Once again, there is no record evidence supporting this conclusion. There is not even inferential evidence upon which to pyramid further inferential evidence to reach that conclusion. The strike was more than one month away. There is no evidence that a strike had been threatened, that a strike vote had been taken, nor any other reason that strikes would have been on any parties' mind. Thus, it is objectively incorrect to state that a June 29 comment is "just prior" to the commencement of a strike.[8] Further, the Judge posits that a "thinly veiled threat with respect to union activity is unlawful." *Communication Workers of America Local 9509,* 303 NLRB 264, 272 (1991) However, the CWA case dealt with an employer explicitly threatening to withhold support to an employee in gaining employment in retaliation for engaging in protected activity. There is nothing analogous in such a threat to an isolated statement that things will not be the same after a strike.[9] Standing alone, a statement that things will not be the same after a strike can objectively be seen as nothing more than a factual prediction and an absolutely true statement that strikes permanently alter relationships.

1. Discharge

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[7] Bisbikis's credited statement is essentially that Laskaris blurted out "if there is a strike, things will never be the same." (Tr. 117) There is simply no plausible reason for this statement to have been uttered and not expounded upon in any way. There were not discussing strikes or union actions, but t-shirts. There is just no plausible reason for Laskaris to utter such a non-sequitur without further exposition.

[8] *United Aircraft Corp.*, 192 NLRB 382, 382 (1971) involved a statement made ***two days*** prior to a strike.

[9] *APA Transport Corp.* 285 NLRB 928, 931 (1987) is similarly distinguishable. The *APA* case involved a statement to an employee that he should not have been hired in a conversation regarding excessive grievance filing. Such a statement certainly can be seen as a thinly veiled threat, particularly in context. In this situation though, Laskaris is alleged to have made his statement in isolation without any elaboration.

The framework for evaluating the discharge of Bisbikis is nuanced, but straight-forward and well established. Section 8(a)(3) of the Act provides, in relevant part that it is an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. 29 U.S.C. Section 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally, encouraging or discouraging participation in concerted or union activities. *Radio Officers Union v. NLRB*, 347 U.S. 17, 39-40 (1954); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 right, any violation of Section 8(a)(3) derivatively violates Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

The Board's Supreme Court approved standard for cases turning on motivation is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 899), cert. denied, 455 U.S. 989 (1982). See *Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries its burden by persuading by a preponderance of evidence that employee protected conduct was a substantial or motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record in its entirety.

Under *Wright Line*, Counsel for the General Counsel must first demonstrate, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor in the adverse action. This burden is satisfied by showing protected activity, employer knowledge of such activity and animus.

If this burden is satisfied, the burden shifts to the employer to prove that it would have taken the same adverse action, even absent the protected activity. *Mesker Door*, 357 NLRB No. 59, slip op. at 2 (2011). The employer does not meet its burden merely showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3-4 (2011). If the employer's preferred reasons are pretextual (i.e. either false or not actually relied upon), the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 213, 223 (D.C. Cir. 2005).

The Judge found, and it is virtually indisputable, that Bisbikis engaged in concerted activity. (ALJD p. 26) He was the union steward, on the union negotiating committee and engaged in a strike.

The Decision's support for an unfair labor practice finding fail thereafter. The next prong required for Counsel for the General Counsel's case is animus. As stated in the decision, common indicators of animus include suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired and disparate treatment of the discharged employees. *Medic One*, 331 NLRB 464, 475 (2000) (ALJD p.26) None of these indicators is present here.

As discussed at length, *supra*, the June 29 conversation is not a cognizable unfair labor practice, nor an indicator of animus.[10] The assumptions attendant to the June 29 conversation and its lack of cognizable legal and factual support collapses the entire framework that Bisbikis was fired unlawfully.

None of the ordinary circumstantial measures usually relied upon by the Board buttresses Counsel for the General Counsel's case. There was no delay in effectuating the discharge.[11] There was no departure from Respondent's normally established procedures for disciplining employees.[12] It cannot be argued that the union or Bisbikis was unaware of the reasons for his discharge because notice was contemporaneous with his discharge.[13] There was no shifting reasons proferred for Bisbikis's discharge, nor is the timing questionable nor suspicious. Finally, there is no indication that the Respondent ever allowed any other employee to swear at, menace and intimidate the President in his own office. Thus, none of the ordinary indicia of pretext is present.

The judge found that Bisbikis swore at Laskaris (in Greek) in Laskaris's office. (ALJD p. 27) Immediately thereafter, he concludes that this circumstance provides evidence that protected activity was a motivating factor in the decision to discharge him. (ALJD p.27)[14] This enormous leap of logic utterly disregards the credited version of events -an employee had the temerity to undermine his boss's authority, in his office in a crass and vulgar manner. The timing of the discharge is not curious - it was immediate. Bisbikis flew off the handle and paid immediate consequences for his behavior. Respondent is not guilty of "setting up" Bisbikis - it did not call for this meeting, nor necessarily expect. However, the converse is likely true, it

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[10] Exception 10
[11] *National Grange Mutual Insurance Co.*, 207 NLRB 431 (1973)
[12] See, *Wells Blue Bunny*, 287 NLRB 827 (1987), enfd. 865 F.2d 175 (8th Cir. 1989)
[13] *Forest Park Ambulance Service*, 206 NLRB 550 (1973)
[14] Exception 11

appears that the union was trying to set up the Employer, as evidenced by the credited testimony after Bisbikis was actually discharged. As the Judge found, Cicinelli smirked and everyone feigned not to have heard anything. (ALJD p.8) This blatant display of sophomoric behavior demonstrates an intention on the part of the union to "troll" for unfair labor practices and they had succeeded.

The Judge followed up the timing issue with an assessment of the Employer's Code of Conduct. (ALJD p.27)[15] This type of bureaucratic thinking is ignores common sense and is strangling employment law cases. Employer's Code of Conduct cannot possibly conjure up every possible scenario that is likely to result in employment consequences. The obvious example is employer codes of conduct rarely, if ever, prohibit crimes like murder or rape. Yet, nobody expects to commit egregious felonies in the workplace and defend themselves that it is not contained in the "code of conduct." Similarly, numerous other obvious examples of unenumerated misconduct exist. Walk into your supervisor's office and tear up their family photo or dump coffee all over their desk. Activity that would warrant a discharge, but almost certainly is not specifically proscribed by a code of conduct. This hyper reliance on formal documents is slaying workplace common sense.

Finally, the Judge absolves Bisbikis of responsibility writing it off to impulsive behavior, not the type of which loses the protection of the Act. (ALJD p.27)[16] *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) However, even if this case fell under *Atlantic Steel,* Bisbikis's actions fall outside of its protections. While discussing a return to work for fellow strikers, Bisbikis and Cicinelli made every effort to create confrontation. Without any provocation whatsoever, Bisbikis took it upon himself to cleverly swear at Laskaris in Greek, walk around the desk and

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[15] Exception 12
[16] Exception 13

violate Laskaris's personal space and yell. Nobody should have to tolerate that level of disrespect, particularly the President of the company. Bisbikis came with the goal of stirring up trouble and he created more than he bargained for.

Moreover, it is time for the Board to pump the brakes on the unlimited lack of civility that Board cases more and more frequently ignore under the *Atlantic Steel* doctrine. As recognized by Member Emanuel in his dissent in a recent decision, "the *Atlantic Steel* and 'totality of the circumstances' tests applied... fail to adequately consider employer property rights, and forbid the imposition of even narrowly tailored discipline..." *Constellium Rolled Products Ravenswood*, 366 NLRB No. 131, slip op. p.6, Member Emanuel, dissenting) While *Constellium* is an employer property rights case, it highlights the conundrum, *Atlantic Steel* has become a panacea to excuse all kinds of outrageous conduct by employees. This presents almost the precise scenario where a slow return to decorum can be returned to the American workplace. The NLRA was passed to foster industrial peace. There is nothing peaceable about an employee menacing the owner of his company. Perhaps, merely calling him a liar is conduct that must be tolerated. But swearing and menacing the President of a company is conduct too far.[17] In any event, Bisbikis lost the protection of the Act with is out of control conduct and he should not seek protection for such conduct from the Agency charged with ensuring industrial peace.

C. 8(a)(1) Findings

1. September 20

The Judge concluded that Laskaris threatened Patrick Lowe when Laskaris told Lowe, after viewing evidence of Lowe's picket line misconduct, that Lowe would not be at the

[17] The Judge did not find that Bisbikis was in Laskaris's personal space. However, he found the Bisbikis was in the doorway, which was not consistent with the three individuals testifying on behalf of Bisbikis.

Company very long. (ALJD p. 21)[18] The Judge found that Lowe has blocked a customer from exiting the dealership from a parking lot exit. (ALJD p. 12) Laskaris had a video of this incident and watched it with Lowe. Lowe lied when asked whether he was the one on the video. (ALJD p. 12) Laskaris challenged Lowe's prevarication, and then "predicted" that Lowe would not be there very long. (ALJD p.21) The Judge analyzed this discussion through the prism of cases where statements are made in jest. Laskaris never took the position that the statement was made in jest and Respondent staked out no such position in its brief.

Each 8(a)(1) allegation is viewed under the seminal decision *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) The case recognizes an employer's right to workplace free speech, so long as the communications are devoid of "threat of force or promise of benefit." Employers are even privileged to make predictions as to the precise effects unionization will have on this company. Counsel for the General Counsel, nor the Charging Party stakes out the position that Lowe's conduct was lawful. The Judge does not attempt to deflect from Lowe's activity, even deeming them "shenanigans." There is no need for the Employer to reach for a defense to its action that the conversation with Lowe was in "jest." It was not. Quite the contrary, it was a pretty straight-forward warning. A reasonable employee, faced with video proof of his illegal conduct, should not take a statement that he would not be around very long as a joke among friends. This is a stern warning from a business owner that illegal conduct will not be tolerated. Viewed through the lens of *Gissel*, this is a lawful prediction that future unlawful conduct will be met with termination. While the statement is reasonably construed as a threat, it can only be reasonably construed as a threat for engaging in workplace misconduct which will lead to discipline, not a threat for union activity. Lowe was not threatened just for joining

[18] Exception 6

strikers, but for doing something wrong while on strike. Accordingly, this allegation should be dismissed.

2. September 25

Similarly, Laskaris's statement that if the dealership ran out of work, he would lay off all the recalled employees was found to be unlawful. (ALJD p.21)[19] The decision correctly posits that the legal question is whether this statement constitutes a threat of retaliation in response to protected activity or a fact-based prediction of economic consequences beyond the employer's control. A common sense reaction to the statement is that this is Economics 101 - "if we do not have any work, then we cannot have any employees." The Judge is critical in his decision that Laskaris did not support this statement with elaborate economic analysis. Yet, this is kindergarten level business, if there is "no work" then layoffs will follow. Nothing in the Act requires an employer to break this down like some CNBC investment show - if we lose 8% of our business revenue then "x" number of layoffs will return us to economic equilibrium. This was a simple, down and dirty observation. The handbills are hurting business. If we run out of work, then we will run out of employees. This is not even a *Gissel* economic prediction, it is a cold-hard fact.

3. October 6[20]

The ill-gotten audio tape of Laskaris's profanity laced tirade on October 6 is likely the action that poisoned the well for Respondent in the mind of the Judge. The meeting was profane, intense, and not fit for children. Laskaris was raging against what he perceived to be frivolous grievances. While the grievances were objectively childish, petty and vindictive, from the

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[19] Exception 7
[20] Exception 8

union's viewpoint there were necessary because of the rapidly deteriorated relationship between the parties since the strike's conclusion.

First, the Decision finds that Laskaris threatened stricter enforcement of the rules. (ALJD p. 22) Each of the cases cited by the Judge arises in the organizing context, involves employer rules and is inextricably intertwined with discipline. Logically, it does not follow that enforcement of a collective bargaining agreement is coercive. Obviously, enforcement of employer rules is a stark reminder of who possesses the power, the proverbial "iron fist inside the velvet glove." Yet, the collectively bargained agreement is the touchstone of employee protection. The employees have sought refuge behind their bargaining agent and at arms length agreed upon protections from employer abuse. It begs credulity to say that the very document which was reached to protect employee rights could equivalently be used as a weapon to undermine employee rights.[21]

Regarding the comments on financial core membership, there is simply nothing in the record that indicates Laskaris exceeded the confines of *Gissel*. First, he plainly expressed that he was stating his personal opinion, ("If I were you.., I would have..."). Second, he did not offer assistance in resigning, he did not offer forms or legal assistance, he did not even tell them to call the Labor Board or union hall. Laskaris stated that employees have a right to become financial core members. This is factually true. This statement has not threat or benefit - explicit or implicit.[22]

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[21] The fact is the finding demonstrates that the statements were equivocal. Laskaris said "**if** I follow that book your life will get harder...we don't want to be that kind of place." (ALJD p.22) It is evident that he had no intention to more strictly enforce any policy, because he wanted a return to the family type atmosphere the dealership had enjoyed for 25 years.

[22] The Judge supported his conclusion with a string cite of 6th Circuit cases from the 1980s. (ALJD pp. 22-23) None of the cases cited supports the notion that Laskaris's statements violate the Act - he did not provide forms to resign, he did not offer the method and means of withdrawal, nor actively encourage consideration of resignation and he did not threaten them in an effort to cajole resignation.

The Decision found an 8(a)(1) because Laskaris factually stated that the strike had cause layoffs among non-unit employees. (ALJD p.24) He pointed demonstrated that sales and parts employees were laid off during the strike. This was demonstrably true. Earlier, the Judge admonished the absence of economic analysis when Laskaris stated that the lack of work would lead to layoffs. In context, Laskaris discussed the ripple effects of the strike - the impact on vendors and manufacturers being impacted. In this instance, Laskaris undertook precisely the type of fact-based analysis to support his statement. This conflicting direction leaves employers in a conundrum, a veritable Catch-22. This was admittedly a difficult discussion regarding the ramifications of the strike, but there is nothing unlawful about truthfully discussing the impact the strike had on other employees.

Finally, the Judge found that Laskaris threatened physical violence in retaliation for strike activity. (ALJD p.24) This is patently absurd. The discussion was cartoonish - "I'm the kind of guy who will eat the kidney out of your body. I will eat your face." The discussion pertained to Laskaris's self assessment of his own personality - I can be kind and giving or I can be incorrigible. The Board has previously considered exactly this type of over the top statement and found it did not violate the Act. *Strauss & Son, Inc.*, 200 NLRB 942-946-947 (1972) (no violation where employees would not believe an employer would load employees into a truck, put dynamite into it and blow them all up.) Even in a society with heightened awareness of mass physical violence, no reasonable person would fear a successful businessman threatening to "eat their faces."

4. October 27[23]

Again, the Employer was found guilty of an 8(a)(1) when discussing economic conditions with employees. Laskaris explained that he had been laying people off and that if this

[23] Exception 9

individual did return, he could not guarantee he would be there long. (Tr. 150) Perhaps Laskaris was guilty of sharing too much information, but an indicator that things were not going well at the dealership should not be conflated with a threat.

D. Other Violations

1. Water and Gloves[24]

The Judge concluded that "price gouging" for water indicated animus toward charging for bottled water. (ALJD p.28) The record is devoid of any evidence of price gouging for water or anything of the sort. The record demonstrated, without contradiction, that employees had always been required to pay for water. (Tr. 249-251) The dealership's water fountain had been broken, and once it was repaired, there was no necessity for the employer to continue providing bottled water. Accordingly, the change in water policy was not done in retaliation for union activity, nor did it require bargaining with the union.

The provision of gloves to employees was a courtesy and a de minimus benefit. An employer is not required to bargain over immaterial terms and conditions of employment.

2. Attendance Policy[25]

The Judge concluded that the promulgation of an attendance policy violated Section 8(a)(3)&(5) of the Act. (ALJD p. 28-30) The attendance policy was dormant as the record did not reflect that the attendance policy was ever given effect. It was admittedly announced, but it was never put into effect due to objection by the union. The collective bargaining agreement specifically permits the parties to negotiate an attendance policy. Since the policy was dormant, there can be no animus for announcing such policy, nor is the any obligation to bargain over a policy that is not given effect.

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[24] Exceptions 14 and 16
[25] Exception 15

3. Union Access[26]

The Decision found that there was no compelling reason for a change in the Employer's access policy.(ALJD p.31) The judge credited testimony that on at least two occasions, union business representatives were either improperly in the facility or engaging customers. (ALJD 9, 11) The collective bargaining agreement does not require unlimited access to the facility. The employer did not deny access to the facility at any time. There is no record evidence that the union's efforts to communicate with its members were frustrated by the Employer's check-in requirement. Under the circumstances, the Employer's requirement that Thomas and Cicinelli not return is not unreasonable. Other local union members still have access as required.

III. CONCLUSION

For all the foregoing reasons, Respondents exceptions should be granted, the judge's order reversed and all allegations dismissed. Failing that, it is respectfully submitted that the matter be remanded to the trial judge, for a hearing on the credibility issues that have not been fully explored.

Dated: August 31, 2018

Respectfully submitted:

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[26] Exception 17

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

CADILLAC OF NAPERVILLE, INC.

and **Case 13-CA-207245**

AUTOMOBILE MECHANICS LOCAL 701, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

CERTIFICATE OF SERVICE

Pursuant to NLRB Rules and Regulations 102.113 and 102.114, I certify that before 5:00 p.m. on August 31, 2018, I served a portable document format (pdf) copy of Respondent's Brief in Support of Exceptions to The Decision and Recommended Order of the Administrative Law Judge, upon Christina Hill, National Labor Relations Board Region 13, through the NLRB's electronic filing system.

On this same date, I certify that I served a copy of Respondent's Brief in Support of Exceptions to The Decision and Recommended Order of the Administrative Law Judge upon the following by email and/or regular mail:

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Dated: August 31, 2018

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